



**QORTI CIVILI PRIM`AWLA**

**ONOR. IMHALLEF  
JOSEPH ZAMMIT MCKEON**

**Illum it-Tnejn 29 ta` Frar 2016**

**Kawza Nru. 17  
Rik. Nru. 1208/15 JZM**

**Catherine Buhagiar  
(K.I. nru. 376163M)**

*u*

**Frank Buhagiar  
(K.I. nru. 769460M)**

*kontra*

**CNJ International Ltd (C8239)**

**Il-Qorti :**

**I. Preliminari**

Rat ir-rikors li kien ipprezentat fil-21 ta` Dicembru 2015 li jaqra :-

1) Illi permezz ta` sentenza tal-Prim`Awla tal-Qorti Civili deciza fit-30 ta` April 2015, b`referenza numru 1013/2013 fl-ismijiet “Catherine Buhagiar u Frank Buhagiar kontra CNJ International Ltd” gie deciz li l-esponenti huma kredituri tas-socjeta` intimata (sentenza hawn annessa u mmarkata bhala Dok `A`);

2) Illi permezz ta` din is-sentenza, is-socjeta` intimata giet ikkundannata thallas lill-esponenti s-somma ta` tnejn u sebghin elf erba` mija u wiehed u sebghin Ewro, u tnejn u tmenin centezmu (€72,471.82) flimkien ma` l-ispejjez ta` sitta u tmenin fil-mija (86%) tal-kawza u bl-imghax legali ta` tmienja fil-mija (8%) fis-sena b`effett mis-6 ta` Frar 2012 sad-data tal-effettiv pagament ;

3) Illi nonostante l-hrug tal-mandat ta` sekwestru fil-25 ta` Mejju 2015 fl-ismijiet “Catherine Buhagiar (K.I Nru 376163M) u Frank Buhagiar (KI Nru 769460M) vs CNJ International Limited” bin-numru 809/2015 hawn ezibit u mmarkat Dok B, is-socjeta` intimata baqghet inadempjenti ;

4) Illi minkejja illi ghaddew iktar minn erbgha u ghoxrin gimgha mill-ezekuzzjoni tal-imsemmi mandat ta` sekwestru, l-esponenti ghadhom sal-lum ma thallsux l-ammont dovut lilhom u ghalhekk is-socjeta` intimata ma tistax thallas id-djun taghha hekk kif provdut fil-ligi permezz tal-artikolu 214(5) tal-Att Dwar il-Kumpanniji (Kap.386 tal-Ligijiet ta` Malta) ;

5) Illi s-socjeta` intimata baqghet tmexxi n-negozju taghha minkejja li ma setghetx thallas lid-debituri taghha u/jew bil-hsieb ta` frodi ta` kredituri taghha jew ta` kredituri ta` xi persuna ohra ;

6) Illi ghalhekk l-esponenti kellhom jintavolaw din il-procedura sabiex din l-Onorabbli Qorti tordna x-xoljiment u l-istralcjar tas-socjeta` intimata ai termini tal-artikolu 214(2)(a)(ii) tal-Kap.386 tal-Ligijiet ta` Malta

7) Salv kull provvediment xieraq u opportun li din l-Onorabbli Qorti joghgobha taghti ;

8) *Illi l-esponenti jafu b`dawn il-fatti personalment.*

*Ghaldaqstant, ghar-ragunijiet hawn imsemmija, ir-rikorrenti umilment jitolbu lil din l-Onorabbli Qorti, prevja kwalsiasi dikjarazzjoni necessarja u opportuna, joghgobha :-*

i) *Tiddikjara li s-socjeta` intimata ma tistax thallas id-djun taghha ai termini tal-artikolu 214(5) tal-Att Dwar il-Kumpaniji (Kap.386 tal-Ligijiet ta` Malta);*

ii) *Tahtar persuna idonea sabiex ikun l-amministratur provvizorju tas-socjeta` intimata ai termini tal-artikolu 228 tal-Kap.386 tal-Ligijiet ta` Malta sakemm jigi ordnat ix-xoljiment u l-istralc tal-kumpanija hekk kif mitlub fit-tielet talba ta` dan ir-rikors u taghtih dawk il-poteri u funzjonijiet li din il-Qorti jidhrilha xieraq fic-cirkostanzi, inkluz dawk il-poteri li normalment huma ezercitabbli mid-diretturi tas-socjeta` intimata ;*

iii) *Tordna x-xoljiment u l-istralc tas-socjeta` intimata ai termini tal-artikolu 214(2)(a)(ii) tal-Att Dwar il-Kumpaniji (Kap.386 tal-Ligijiet ta` Malta);*

iv) *Tordna li jigi appuntat persuna idonea sabiex ikun l-istralcjarju tas-socjeta` intimata u dan skond id-disposizzjonijiet tas-sub-titolu I tat-Titolu II tat-Taqsima V tal-Att Dwar il-Kumpaniji (Kap.386 tal-Ligijiet ta` Malta).*

*Dan taht dawk il-provvedimenti ohra inkluz jekk din l-Onorabbli Qorti jidhrilha xierqa inkluzi ordnijiet interim.*

*Bl-ispejjez kontra s-socjeta` intimata u b`rizerva ghal kwalsijasi azzjoni ulterjuri spettanti lis-socjeta` esponenti inter alia ai termini tal-Artikoli 303, 315, u 316 tal-Att Dwar il-Kumpaniji.*

*Rat illi r-risposta tar-rikorrenti kienet ikkonfermata bil-gurament mir-rikorrenti Catherine Buhagiar.*

Rat id-dokumenti li kienu prezentati mar-rikors promotur.

Rat ir-risposta li pprezentat l-intimata fit-22 ta` Jannar 2015 li taqra hekk :-

1. *Illi s-socjeta` CNJ International Ltd ilha ma topera ghal numru ta` snin, anke qabel ma l-attrici kienet fethet il-kawza : Cit. Nru: 1013/2013 (deciza minn din l-Onorabbli Qorti kif presjeduta) fit-30 ta` April 2015 ;*

2. *Illi ghalhekk mhux minnu li s-socjeta` intimata baqghet tmexxi xi forma ta` negozju bi frodi tal-kredituri taghha kif qeghda tallega l-attrici ;*

3. *Illi kif anke spjegat waqt il-kawza Cit. Nru. 1013/2013 fl-ismijiet premissi, il-kumpannija intimata ma kellhiex assi hliet gym equipment li ghadu proprjeta` tas-socjeta` intimata sal-llum ;*

4. *CNJ International Ltd kellha tieqaf topera minhabba cirkostanzi li ma kellhiex kontroll fuqhom kemm kif spjegati waqt il-kawza `l fuq imsemmija u kif jigi spjegat waqt din il-kawza ;*

5. *Illi barra dan l-equipment is-socjeta` intimata m`ghandhiex assi ohra ;*

6. *Illi l-istess attrici dejjem kienet taf il-profil u l-assi li kellha l-kumpannija li qatt ma kienet xi kumpannija kbira b`hafna assi ;*

7. *Salvi eccezzjonijiet ulterjuri skont il-ligi.*

Rat illi r-risposta kienet ikkonfermata bil-gurament minn Claudio Caruana.

Rat il-lista tax-xhieda ndikati mill-kumpannija ntimata.

Rat il-verbal tal-udjenza tal-1 ta` Frar 2016.

Rat id-digriet illi tat fl-istess udjenza fejn ordnat l-allegazzjoni tal-atti tal-kawza fl-ismijiet “Catherine Buhagiar et vs CNJ International Limited” (Rik. Gur. Nru. 1013/13 JZM) li kienet deciza fit-30 ta` April 2015.

Rat l-atti tal-kawza li kienu allegati.

Rat id-digriet li tat fl-istess udjenza fejn halliet il-kawza ghas-sentenza ghal-lum.

## II. Konsiderazzjonijiet

### 1) Locus standi tar-rikorrenti

Huwa evidenti min-natura tat-talbiet illi dak li riedu jiksbu r-rikorrenti bil-procediment tal-lum huwa x-xoljiment u l-istralc ta` s-socjeta` CNJ International Ltd abbazi tal-**Art 214(2)(a)(ii) tal-Kap 386**.

L-eligibilita` o meno tar-rikorrenti li jmexxu bl-azzjoni tal-lum hija stabbilita` fl-**Art 218 tal-Kap 386**.

Skond l-Art 218(1)(b), talba lill-Qorti ghal xoljiment u stralc ta` kumpannija skond l-Art 214(2)(a) ghandha jsir b`rikors. Sabiex ikun sodisfatt il-vot tal-ligi, mhuwiex rikjest li r-rikors ikun guramentat ; lanqas li jkun rikors guramentat skond kif mifhum fil-kuntest tal-Kap 12 tal-Ligijiet ta` Malta. Ghalhekk ma hemmx ghalfejn li r-risposta tkun guramentata.

Fil-kaz tal-lum, kien ikun ahjar illi kieku l-partijiet, b`mod partikolari l-atturi, qaghdum ma` dak li tipprovdi l-ligi fil-presentata tal-istanza tagghom, sabiex jigu evitati ekwivoci ta` kull xorta, ghad illi bil-fatt illi r-rikors kien ikkonfermat bil-gurament ma kienx

hemm ksur sostanzjali tad-disposizzjoni tal-ligi. L-istess ighodd ghall-intimata.

Fost il-persuni li jistghu jipprezentaw ir-rikors skont l-Art 214(2)(a) hemm il-kreditur. Jirrizulta ppruvat illi r-rikorrenti huma kredituri tas-socjeta` intimata, u ghalhekk ghandhom *locus standi* sabiex jittentaw l-azzjoni tal-lum skond l-Art 218(1)(b) tal-Kap 386.

## 2) L-Art 214(2)(a)(ii) tal-Kap 386

Skont id-disposizzjoni li fuqha qeghdin jistrieħu specifikament ir-rikorrenti, *kumpannija tista' xxolji u tkun stralcjata mill-qorti ... jekk il-kumpannija ma tkunx tista' thallas id-djun tagħha*.

Il-Qorti tirrileva illi meta tfassal il-mudell għal-ligi tagħna l-gdida dwar il-kumpanniji, il-qafas magħzul kien dak tal-Companies Act Ingliza 1985. Fil-ligi Ingliza, ix-xoljiment u l-istralc ta` kumpanniji kien trattat f'legislazzjoni *ad hoc* u cioe` l-Insolvency Act 1986. Meta fl-1995 saret il-ligi tagħna l-gdida dwar il-kumpanniji li hadet post il-Commercial Partnerships Ordinance 1962, id-disposizzjonijiet li jolqtu x-xoljiment u l-istralc kienu integrati fl-Att XXV tal-1995.

Kif sejrin naraw, fil-ligi tagħna, li *kumpannija ma tkunx tista' thallas id-djun tagħha* għandu sinjifikat preciz u definit mil-ligi stess. Fil-ligi Ingliza, il-posizzjoni hija aktar wiesgha. Il-koncett ta` insolvenza fil-ligi tagħna huwa aktar ristrett minn dak tal-ligi Ingliza għalkemm hemm *overlaps*.

Fit-Tmien Edizzjoni (2012) ta` l-ktieb Boyle & Birds` Company Law (pubblikat minn Jordans) pg 859 jinghad hekk –

*There are two principal, although not exclusive or exhaustive, tests of insolvency : a company is insolvent if it unable to pay its debts as they fall due (“cash flow insolvency”) ; it is also insolvent if its liabilities exceed its assets (“balance sheet insolvency”) ...*

3) **L-Art 214(5)(a) u (b) tal-Kap 386**

**L-Art 214(2)(a)(ii)** irid jinqara flimkien ma` l-**Art 214(5)** li jistabilixxi meta kumpanija skont il-ligi taghna ghandha titqies li ma tkunx tista' thallas id-djun taghha.

**Tnejn** huma c-cirkostanzi definiti mil-ligi stess –

*(a) jekk id-dejn dovut mill-kumpanija jkun baqa' ma thallasx ghal kollox jew f'parti wara erbgha u ghoxrin gimgha mill-ezekuzzjoni ta' titolu ekekuttiv kontra l-kumpanija b`xi wiehed mill-atti ekekuttivi msemmijin fl-artikolu 273 tal-Kodici ta' Organizzazzjoni u Procedura Civili ;*

*jew*

*(b) jekk ikun ippruvat ghas-sodisfazzjon tal-qorti li l-kumpanija ma tkunx tista' thallas id-djun taghha, meta din tqis ukoll il-passiv kontingenti u prospettiv tal-kumpanija.*

**Abbazi tal-atti huwa evidenti li r-rikorrenti qeghdin jistrieħu fuq il-paragrafu (a) sabiex isostnu l-pretensjoni taghhom.**

4) **L-Art 214(5)(a) tal-Kap 386**

B`mod aktar strett, fil-ligi taghna dak previst mill-Art 214(5)(a) jixbah il-koncett ta` *cash flow insolvency* fil-ligi Ingliza.

Fil-kaz ta` *cash flow insolvency* din il-Qorti tghid illi filwaqt fil-ligi taghna huwa specifikat **bil-preciz** x` m`ghandhiex taghmel kumpanija debitrice sabiex ma tkunx meqjusa li ma tistax thallas id-djun taghha, fil-ligi Ingliza il-kriterju huwa aktar generiku ghax ikun hemm dik it-tip ta` insolvenza *if it unable to pay its debts as they fall due*.

Fil-**Boyle & Birds` Company Law** (op. cit.) ikompli jinghad hekk –

*Failure to pay a debt which is due and not disputed amounts to evidence of cash flow insolvency. Thus a company which has a policy of late payment of bills could find itself the subject of a petition for a winding-up order or administration order. Such a petition will not be struck out at an early stage as a form of improper pressure and an abuse of the process of the court, because, as Staughton LJ explained in Taylor's Industrial Flooring (1990. BBC 44 at 51) creditors, not late payers, are more worthy of insolvency law's protection.*

*"Many people today seem to think that they are lawfully entitled to delay paying their debts when they fall due or beyond the agreed period of credit, if there is one ... This can cause great hardship to honest traders, particularly those engaged in small businesses recently started. Anything which the law can do to discourage such behaviour in my view should be done."*

Fil-ktieb **Insolvency Law – Corporate and Personal** ta` Andrew Keay u Peter Walton (pubblikat minn Pearson Longman – 2003) pg 17 jinghad hekk dwar *cash flow insolvency* kif mifhuma fil-kuntest tal-Insolvency Act 1986 –

*The court, in examining whether a company is suffering cash flow insolvency, will consider whether the company is actually paying its debtors. Courts must take into account what current revenue the company has as well as what the company can procure by realising assets within a relatively short time ... A company can rely upon money which might be obtained from the sale of assets or upon money which might be obtained on the strength of its assets ... It is possible that sometimes a debtor might be able to establish solvency by demonstrating that funds can be obtained through an unsecured loan. In considering whether a person or a company is insolvent, the debtor's whole financial position must be studied ... and a temporary lack of liquidity does not necessarily mean that the company is insolvent ...*

*At one time courts were rather strict on what they required to be established before they were willing to deem a person or a company insolvent, but in more recent times they have become more liberal as far as creditors are concerned and have held that a debtor is insolvent if a creditor is able to prove that he or she has not paid an undisputed debt after a demand has been made ... and this is the case even if there is other evidence which suggests that the value of the assets outweighs liabilities ...*

*Whether a company is cash flow insolvent is principally a question of fact and one which may be established in any number of ways, such as the*



*existence of a large number of outstanding debts and unsatisfied judgments ... or there is lack of assets on which execution can be levied ...*

*It has been said that a debtor is not regarded as solvent just because if sufficient time were granted the debts could be paid off ...*

**Biex nigu ghall-kawza tal-lum, jirrizulta illi wara li kisbu titolu ezekuttiv bis-sentenza ta` din il-Qorti tat-30 ta` April 2015 fil-kawza fl-ismijiet “Catherine Buhagiar et vs CNJ International Ltd” (Rik. Gur. Nru 1013/13 JZM) [DOK A], ir-rikorrenti pprezentaw il-Mandat ta` Sekwestru Ezekuttiv Nru 809/2015 li kien akkordat fil-25 ta` Mejju 2015.**

**Il-Mandat ma kienx biss notifikat lil sekwestratarji, izda wkoll lil Nadia Caruana, evidentement sabiex tkun notifikata wkoll is-socjeta` ntinata.**

**Is-sekwestratarji u Nadia Caruana kienu lkoll notifikati fis-26 ta` Mejju 2015 [ara DOK B]**

**Hija l-gurisprudenza ta` din il-Qorti illi fejn si tratta ta` atti ezekuttivi ndikati fl-Art 273 tal-Kap 12, il-fattur rilevanti sabiex jiskatta l-perijodu ta` erbgha u ghoxrin (24) gimgha ghall-fini tal-Art 214(5)(a) tal-Kap 386 huwa l-ezekuzzjoni tal-Mandat.**

**Tenut kont tad-data tal-ezekuzzjoni tal-mandat ezekuttiv fuq riferit, u tad-data tal-prezentata tar-rikors tal-lum, din il-Qorti hija tal-fehma li fil-kaz tal-lum, il-vot tal-Art 214(5)(a) tal-Kap 386 huwa sodisfatt.**

##### **5) Allegat kummerc bi frodi**

**Fil-premessi tar-rikors promotur, ir-rikorrenti allegaw illi s-socjeta` intimata baqghet tmexxi n-negozju taghha minkejja li ma setghetx thallas lid-debituri taghha u/jew bil-hsieb ta` frodi ta` kredituri taghha jew ta` kredituri ta` xi persuna ohra. L-intimata tichad li gara hekk mhux biss fir-risposta taghha, izda permezz tad-dikjarazzjoni li saret mid-difensur tal-**

intimati fl-udjenza tal-1 ta` Frar 2016. Dan premiss, il-fondatezza o meno ta` din l-allegazzjoni ma tistax tigi accertata fil-procediment tal-lum, kif huwa evidenti minn dak illi jghid l-**Art 315 tal-Kap 386**. Ghalhekk fil-procedimenti tal-lum il-Qorti mhijiex sejra taghti konsiderazzjoni ghall-allegazzjoni tar-rikorrenti.

## 6) Id-diskrezzjoni tal-Qorti

Ghalkemm irrizulta li l-kumpannija ntimata mhijiex f`qaghda li thallas id-djun taghha, tibqa` finalment id-diskrezzjoni tal-Qorti dwar jekk ghandhiex tghaddi ghax-xoljiment u ghall-istralc tal-kumpannija.

Il-Qorti taghmel riferenza ghal Pg 913-914 ta` **Boyle & Birds` Company Law** – 8<sup>th</sup> Edition – 2011 :

*Unpaid creditors of a company may consider commencing winding-up proceedings against the company as an alternative to suing for payment. As a debt collection mechanism, winding up proceedings may be swifter and, for the individual creditor, less expensive than a claim that may come to trial for some time ; **on the other hand, winding up is a collective procedure for the benefit of creditors generally and it does not benefit specific creditors individually (F. Oditah “Winding Up Recalcitrant Debtors” 1995 LMCLQ 107)** ...*

*Since winding up is a collective procedure for the benefit of creditors generally, one situation where the court may exercise its discretion against winding-up is where other creditors in the same class oppose the making of the order. In this regard the court will usually have regard to the majority of the creditors and will refuse the petition if its opposed by the majority.*

Dan premiss, u wara li rat l-atti tal-kawza li bis-sahha taghha r-rikorrenti kisbu t-titolu ezequttiv, wara li tat qies ghar-risposta li pprezentat l-intimata fil-procediment tal-lum, u wara li tat piz ghal dak iddikjarat mir-rapprezentant legali tas-socjeta` ntimata fl-udjenza tal-1 ta` Frar 2016, hija l-fehma konsiderata ta` din il-Qorti illi ghax in-negozju tas-socjeta` ntimata huwa wieqaf, il-ftit assi mobbli li ghandha s-socjeta` rikorrenti mhumieq bizzejjed sabieq jissoddisfaw il-kredituri nkluz ir-rikorrenti.

It-thassib tal-Qorti huwa li s-socjeta` ntimata donnha qatghet qalbha. Kumpanija li ma taghmilx negozju hija entita` bla ruh ghaliex ma tkunx qeghda taqdi l-ghanijiet taghha. Kumpanija li ma tiggenerax attivita` ekonomika ma jistax ikollha dhul, u minghajr dhul, ma tista` qatt thallas id-dejn taghha.

Fil-kaz tal-lum, il-Qorti hija sprovvista mill-icken prova illi l-azzjonisti tas-socjeta` ntimata wrew imqar hajra jew intenzjoni li jinvestu sabiex jaghtu ruh lill-kumpanija.

Ghalhekk ghal din il-Qorti, ix-xoljiment u l-istralc tal-intimata huwa inevitabli.

### Provvediment

Ghar-ragunijiet kollha premessi, il-Qorti tipprovdi dwar it-talbiet tar-rikorrenti billi :-

1) Riferibbilment ghall-ewwel talba, tiddikjara li fir-rigward tal-kumpanija CNJ International Ltd (C8239) jirrizultaw pruvati sal-grad rikjest mil-ligi r-rekwiziti tal-Art 214(2)(a)(ii) u tal-Art 214(5)(a) tal-Kap 386 tal-Ligijiet ta` Malta.

2) Tastjeni milli tiehu konjizzjoni ulterjuri tat-tieni talba.

3) Riferibbilment ghat-tielet talba, tordna x-xoljiment tal-kumpanija CNJ International Ltd (C8239) b`effett mill-21 ta` Dicembru 2015 skont l-Art 223(1) tal-Kap 386. Tordna wkoll l-istralc taghha.

4) Riferibbilment ghar-raba` talba, tahtar lir-Ricevitur Ufficjali bhala stralcjarju bis-setghat u d-dmirijiet kollha li huma stabbiliti fil-Kap 386 tal-Ligijiet ta` Malta. Bla hsara ghall-generalita` tas-setghat u dmirijiet :-

a) wara li jikseb dikjarazzjoni dwar il-qagħda tal-kumpannija intimata, kif irid l-Art 226 tal-Kap 386 tal-Ligijiet ta` Malta, tagħmel rapport lill-Qorti, kif irid l-Art 227 tal-Kap 386 tal-Ligijiet ta` Malta.

b) jagħmel verifika ta` l-assi u tad-djun tal-kumpannija intimata ; u jekk ikun il-kaz, jagħmel il-gradwazzjoni tad-djun.

c) jekk ikun il-kaz, jiehu taht il-kustodja jew kontroll tieghu l-assi tal-kumpannija intimata, kif ighid u jrid l-Art 237 tal-Kap 386 tal-Ligijiet ta` Malta.

d) jagħmel jew jiddefendi kull azzjoni jew procediment legali iehor fl-isem u fl-interess tal-kumpannija intimata.

e) tipprezenta r-rapport lill-Qorti mhux aktar tard minn tlitt xhur mil-lum.

5) Bl-applikazzjoni tal-Art 236(2) tal-Kap 386, tordna lir-rikorrenti u lill-kumpannija intimata sabiex *in solidum* bejniethom ihallsu l-ispejjez ta` dan il-procediment, kif ukoll l-ispejjez tal-istralc, inkluzi d-drittijiet u l-ispejjez tal-istralcjarju.

Thalli l-istralc għall-udjenza ta` nhar il-Hamis, 16 ta` Gunju 2016 fid-9.00 a.m.

**Onor. Joseph Zammit McKeon**  
Imhalled

**Amanda Cassar**  
Deputat Registratur